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Bettilyon Construction Company v. State Road Commission Of Utah : Appellant's Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

BETTILYON CONSTRUCTION
COMPANY, a corporation,

Plaintiff and Appellant,

- vs. -

STATE ROAD COMMISSION OF
UTAH,

Defendant and Respondent.

Case No. 10897

APPELLANT'S BRIEF

Appeal from an Order of Dismissal
of the District Court of Salt Lake County
Honorable D. Frank Wilkins, JUDGE

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- vs. -

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Defendant and Respondent.

Case No. 10897

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action for damages for breach of contract by the defendant, State Road Commission, whereby said defendant failed to furnish a free and clear right-of-way before requiring plaintiff to commence construction thereon.

DISPOSITION OF THE CASE
BY LOWER COURT

The Lower Court granted defendant's Motion to Dismiss wherein it was alleged as the only grounds for the Motion that,

(1) Plaintiff's Complaint failed to state a claim on which relief could be granted, and

(2) The court lacked jurisdiction over the State Road Commission in that the defendant was acting in its governmental function and had not consented to be sued.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the final Order of the Lower Court with instructions to determine its damages and a Judgment wherein its right to pursue this action is upheld as a matter of law.

STATEMENT OF FACTS

This Court has previously ruled that in passing on a Motion to Dismiss, all of the facts alleged and set forth in the pleading attacked must be assumed to be true. *Slater v. Salt Lake City*, 115 Utah 476, 206 P. 2d 153. Based on this rule, the facts to be considered are as follows:

On or about January 22, 1963, Bettilyon Construction Company entered into a contract with the defendant by and through its Department of Highways, for the construction of an elevated highway near 6th South Street in Salt Lake City, which said highway was designed to serve vehicular traffic leaving Interstate Highway 15 and Interstate Highway 80, Salt Lake County, Utah known as Project No. I-IG-15-7(34) Second Contract and Project No. I-15-7 (46) 306 Second Contract.

The burden of furnishing the right-of-way to a contractor who is to build a highway for the State Road Commission of Utah is entirely and completely the obli-

gation and burden of defendant in that this contract by its own terms incorporated Paragraph 1-7.18 of the Standard Specifications for Road and Bridge Construction of the State of Utah issued by defendant in 1960 of which this Court may take judicial notice under the provisions of Section 78-25-1 UCA 1953. This paragraph provides:

“The Director [of Highways] will be responsible for the securing of all necessary rights-of-way *in advance of construction.*” (Emphasis added)

Thereafter, on or about February 7, 1963, the EIMCO Corporation filed a Complaint in the District Court of Salt Lake County as Civil No. 141252, naming the plaintiff and the individual commissioners of defendant herein as defendants, wherein it was requested that plaintiff be restrained from constructing said highway until such time as the nature and extent of the easement necessary to construct the aforesaid elevated highway could be determined and compensation be paid to the EIMCO Corporation for an alleged taking of its property.

As a result of the commencement of this action, title to the right-of-way necessary for the construction of said elevated highway was in dispute.

Thereafter, plaintiff requested that defendant provide counsel or representation on its behalf to defend the action brought by the EIMCO Corporation.

The defendant, State Road Commission of Utah, at no time agreed to furnish legal representation for plain-

tiff in the aforesaid action, but refused to do so on the grounds that legal counsel might have a conflict of interest. In fact, a conflict of interest did exist because defendant further informed plaintiff that it would be required to complete the aforesaid contract according to its terms thereby subjecting itself to possible damages to the EIMCO Corporation.

As a result of defendant's refusal to furnish legal representation to plaintiff and further insistence that plaintiff go forward with the construction project before the dispute over the right-of-way had been resolved, plaintiff was required to obtain counsel to represent it in determining the issues raised by the EIMCO Corporation in the aforesaid action. In this connection, plaintiff incurred legal expenses in the amount of \$2,144.00.

Plaintiff has demanded payment from the State Road Commission for its necessary legal expenses incurred in the aforementioned action, but defendant has refused to pay the same suggesting that plaintiff should initiate legal action to enforce its claim. By contract plaintiff is also entitled to an additional reasonable attorneys' fee herein in connection with this action to enforce its rights against defendant's breach of contract.

ARGUMENT

POINT I

BETTILYON CONSTRUCTION COMPANY HAS STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The parties hereto entered into a contract. The State Road Commission as a party thereto was required to

furnish to the plaintiff a right-of-way on which to commence the work before that work could be commenced. At the time the plaintiff, as contractor, was required to commence construction, the extent of right-of-way available to it was in dispute. Plaintiff has alleged that the defendant, State Road Commission, refused to perform under the contract and that damages have resulted from this refusal.

It seems clear that a claim upon which relief could be granted has been stated unless the defendant enjoys statutory immunity from suit or unless its requirement that plaintiff commence work on a disputed right-of-way as a matter of law did not constitute a breach of its contract with the plaintiff. These matters will be discussed in the next succeeding Points.

POINT II

**THE DEFENDANT, STATE ROAD COMMISSION,
HAS NO GOVERNMENTAL IMMUNITY IN THIS
ACTION.**

Section 27-12-9, Utah Code Annotated 1953, as amended, provides:

“By its name the Commission may sue, and it may be sued only on written contracts made by it or under its authority.” (Emphasis added)

Identical language as contained in Section 36-2-1 Rev. St. 1933 was construed by the Utah Supreme Court in the case of *Campbell Building Company v. State Road Commission*, 95 Utah 242, 70 P. 2d 857. There a contractor brought an action for damages arising out of breach of contract. Delay resulting from failure of the

State to provide a right-of-way was alleged. The defenses raised were grounded in governmental immunity and it was contended that the State of Utah was not liable on its contracts as would be an individual but was only responsible in specific performance.

The Court, in a lengthy Opinion discussed the allegations of the State's defense, and in applicable part stated:

"The statutory provision is twofold. First, it waives immunity from suit by saying 'the commission * * * may be sued,' and, second, a limitation is imposed by the following language: 'only on written contracts made by it or under its authority.' " . . . 70 P. 2d 861

The Court continued:

"The contract in question is one made by the commission under its authority. It is such a contract as may be 'sued on' under the statute. The defendant says that the right to sue the State Road Commission conferred by the statute 'only embraces suits in specific performance of the written contracts it has power to make and for funds payable under such contracts for road construction only.' The statute, however, places no such restriction on the right to sue, but merely says the commission may be sued on its written contracts." . . . 70 P. 2d 861

The question of the liability of the State for damages for failure to furnish right-of-way was resolved as follows:

"The statutory provision must mean what the language naturally imports, that any suit on a

written contract which could be brought by the contractor against the other contracting party, if an individual, corporation, or municipality, might now be maintained under this authorization against the State Road Commission acting for the state, 29 C.J. 567." . . . 70 P. 2d 861

After citing several cases and discussing the principle of sovereign immunity at length, the Court continued:

"The cases hold, and that is the reasonable view to take, that *where work is delayed by failure to provide right-of-way or by interference of the state engineer, causing extra expenses, such are matters of breach of contract, and whether or not negligence enters into the matter is of no moment.*" . . . "*When the contractor is placed by act of the state in a position that it becomes necessary for him to incur the burden of extra work to complete the job agreed upon, he is entitled to just compensation therefor.*" (Emphasis added) . . . 70 P. 2d 861

There is widespread support for the proposition that, where a state may be sued on its contracts, an action may be brought against it for damages for breach of contract. See 81 C.J.S., States, 125.

The matter seems clearly settled in Utah where the State Road Commission enjoys no immunity for breach of its written contracts and an action may be brought against it for damages arising out of such a breach.

POINT III

FAILURE TO FURNISH RIGHT-OF-WAY HEREIN
IS A BREACH OF CONTRACT AS A MATTER OF
LAW.

The only other possible ground for granting the Motion to Dismiss below is that the State Road Commission did not breach its written contract as a matter of law. While a state possibly might not be able to breach on implied contracts, the condition breached here is not implied, but express. Several courts have dealt with similar fact situations. The case of *Derby Road Building Company v. Commonwealth Department of Highways*, Ky., 317 S.W. 2d 891, involved a highway contractor's action against the State of Kentucky to recover for losses incurred because of delay in completing a contract project because the utility lines had not been relocated. The standard specifications of the State of Kentucky concerning right-of-way read as follows:

"The right-of-way for the highway will be obtained by the Department prior to issuing the 'Notice to Begin Work' . . ."

The Court said,

"Even without this express provision of the contract, it may be said that a contract for the construction of a building or highway 'implies as an essential condition that a site shall be furnished upon which a structure may be erected.'"

Citing 9 Am. Jur., Building and Construction Contracts, Section 16 and *Guerini Stone Company v. Carlin Construction Company*, 248 U.S. 334, 39 Sup. Ct. 102, 63 Law Ed. 275. The Court continued,

"The implied condition or agreement as a prerequisite to the contractor to performing his part of the contract is not to be confused with an

implied contract, for a breach of which neither the State nor its agency in executing or performing a governmental function can be held liable in damages."

Regarding sovereign immunity, the Court continued,

"First we note the distinction that this is not an action in tort, but is an action for the breach of an express contract made by the State's Department of Highways . . ."

The Court then cited the case of *Watkins v. The Department of Highways*, 290 S. W. 2d 28, for the proposition that the plaintiff could have maintained a suit on its contract against the Department to enforce certain rights. Quoting from the latter case, the Court said,

"Surely when the Department of Highways was authorized to enter into this contract, the Legislature contemplated a binding agreement legally enforceable by both parties. A mutuality of obligation was created. To deny appellants a right of action would be to destroy the sanctity of all contracts made by State Agencies and would seriously impair the operation of our Government. It may be said that the Legislature, in authorizing the Department to enter into a Contract, by necessary implication authorized it to sue or be sued thereon."

The case of *Wunderlich v. State Highway Commission*, 183 Miss. 428, 184 So. 456, involved an action by a contractor against the State Highway Commission of Mississippi to recover the expenses paid by the contractor incurred in the construction by him of a highway for the Commission. Involved in this action were certain

damages resulting from an alleged failure to furnish right-of-way. The Court discussed at some length the obligation of the State regarding damages on its contract with private parties and concluded:

“No public policy there intervenes to excuse the State from its contract obligations and for the proximate consequences of its breach thereof; and so we hope that, in such a case, the State is as a private contracting party, with the same rules of liability to be applied; and when, as here, the State creates an agency for the construction of buildings or roads or the like, and gives to that agency the dignity of a corporate body, authorizes it to make the particular construction contracts such as here in question; empowers it to supervise the execution thereon and to pay for the same out of funds supplied into the hands of said agency, and finally allows it, in broad and general terms, to sue and be sued, then that agency must stand in a suit by the contractor in all matters respecting the performance of its contract, and as to breaches of it during the course of such performance, as if the agency were a private party, and in accordance with the general contract . . .”

A subsequent appeal involving the same facts of the situation upheld the principle that the State Highway Commission is liable for a breach of contract to the principal contractor for the expenses incurred by the principal contractor as a result of a delay in procuring a right-of-way. See 10 So. 2d 453, Suggestion of Error Overruled 194, Miss. 119, 11 So. 2d 437.

A case very similar to the one under consideration is *Madison County Construction Company v. State*, 31

N.Y.S. 2d 883. In that case the contractor brought an action against the State of New York seeking reimbursement for a judgment recovered against the construction company by landowners for trespass and for the costs and expenses incurred in defending such action by landowners. The facts disclosed that in 1937 the contractor entered into a contract with the State of New York for the construction of a highway. Later in the same month, it was notified to start work immediately on construction of the project. Work was begun and continued until its completion on November 5, 1938. On November 16 of 1938 the highway was accepted by the State. In May of 1938 an action was brought against the contractor to eject from the lands involved in the construction project and in 1939 a decision was rendered against the claimant awarding the plaintiff nominal damages and costs, holding that the contractor in performance of its work trespassed upon lands which had not been properly acquired by the State.

The New York Court of Claims held that,

“By failure to give to claimant the site of the work, the State breached the contract, thereby causing claimant to be delayed in the performance thereof and claimant is entitled to compensation therefor.” *Mansfield v. New York Central Railroad Company*, 102 N.Y. 205, 6 N.E. 686, *Schunemunk Construction Company v. State of New York*, 116 Misc. 770, 189 N.Y. Supp. 567, *Wright & Kremers, Inc., v. State of New York*, 263 N.Y. 615, 189 N.E. 724.

The Court continued,

“Among the damages claimed were those for costs, legal fees, and disbursements incurred in defending the action in the Supreme Court. Ordinarily, costs and expenses in a prior action are not recoverable in a separate and subsequent action, but there are exceptions to such rule.”

The Court cited *Cooper v. Weissblatt*, 154 Misc. 522, 277 N.Y.S. 709, 719 as follows:

“There are also cases where a breach by the defendant of a contract between him and the plaintiff has resulted in a judgment being obtained against the plaintiff in a prior action. In these cases the plaintiff has been permitted to recover of the defendant, in a subsequent action, the amount of damage awarded against him in the prior action, and also the legal expenses incurred by him in defending that action, especially where the defendant has been requested to come in and defend. *Carleton v. Lombard*, 19 App. Div. 297, 46 N.Y.S. 120, affirmed 162 N.Y. 628, 57 N.E. 1106; *Dubois v. Hermance*, 56 N.Y. 673. The theory of such cases quoted seems to be that the defendant must be deemed to have contemplated that the breach of his contract with the plaintiff might subject the latter to damages in an action by a third party, and therefore, he is deemed in law to have impliedly agreed to become responsible therefor. . .”

The Court also cited 25 C.J.S., Damages, Section 50 (c), Page 534 as follows:

“Where the natural and proximate consequence of a wrongful act has been to involve plaintiff in litigation with others, there may, as a general rule,

be a recovery in damages against the author of such act of the reasonable expenses incurred in such litigation, together with compensation for attorney's fees and such costs as may have been awarded against plaintiff; but such expenses must be the natural and proximate consequence of the injury complained of, and must have been incurred necessarily and in good faith, and the amount thereof must be reasonable."

"Here, the State made a contract with the claimant. Engineers for the State made plans for the construction of the highway and the State got the location of the road. Claimant was directed to proceed with its work on such location and in the action referred to was compelled to cease operations. *It then had to defend itself in the absence of a defense on the part of the State so that the question could be decided as to whether the location of the highway was upon public or private lands. It could not, of course, proceed with the work until that question had been determined. In the action, it was held that the location of the road, as fixed by the State authorities and upon which location claimant was working, included lands which were not owned by the State, but by private parties. In effect, it means that the State, in staking out the highway, had led the claimant to believe that it was working on land acquired by the State which was not the fact. The legal expenses were not incurred in litigation between the parties, but in an action between a third party and the claimant, growing out of the unlawful acts of the State. Under these conditions and from the authorities cited, I am satisfied that claimant is entitled to recover from the State the damages caused by the delay in the work . . .*" (Emphasis added)

So in the present case, Bettilyon Construction was forced by the defendant to defend an action wherein the question was whether the proposed right-of-way was public or private property. Plaintiff had no assurance that the right-of-way was clear. By failing to give plaintiff a clear work site, the Road Commission breached its contract and caused the plaintiff to incur expenses of defending the suit. Plaintiff is entitled to compensation for these expenses.

CONCLUSION

The Judgment of Dismissal of the Lower Court is not in harmony with the law. It should be reversed with instructions to determine plaintiff's damages and to grant judgment therefor in accordance with the law.

Respectfully submitted,

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